

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

Blue Spike, LLC,

Plaintiff,

V.

Audible Magic Corp.,

Defendant.

Case No. 6:15-cv-584

JURY TRIAL DEMANDED

**BLUE SPIKE’S SUPPLEMENTAL SUR-REPLY TO AUDIBLE MAGIC’S MOTION FOR
SUMMARY JUDGMENT OF NONINFRINGEMENT [DKT. 13]**

On August 25, 2015, the Court held a hearing on a number of motions including Audible Magic’s Motion for Summary Judgment of Noninfringement. At the hearing, the Court expressed more interest than anticipated on Scott Moskowitz’ state of mind in relation to statements he made during six days of depositions. In the interest of clarifying Mr. Moskowitz’ state of mind and aiding the Court in deciding the present matter on the merits, Blue Spike offers a declaration from Mr. Moskowitz. Included are transcript excerpts from the deposition of Blue Spike’s infringement expert Dr. Ahmed Tewfik conducted after Blue Spike’s opposition was filed.¹ His testimony significantly clarifies Scott Moskowitz’ statements and further establishes the consistency of Blue Spike’s infringement position—that MFCCs are abstracts but do not perform all that is taught in the patents-in-suit. Additionally, Blue Spike provides excerpts from Scott Moskowitz’ deposition, some of which are already quoted in the briefing.

¹ Blue Spike notes that the deposition of Dr. Ahmed Tewfik was conducted after Blue Spike's opposition but before its sur-reply. Blue Spike also notes that the *DataQuill* order on which Audible Magic's motion for reconsideration of its Daubert brief relied was filed four days prior to Audible Magic's underlying reply. Considering the remaining confusion surrounding Mr. Moskowitz' statements, Blue Spike respectfully asks the Court for similar leniency in order to resolve this issue on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this document was served on all counsel who are deemed to have consented to electronic service. Local Rule CV-5(a)(3)(A). Pursuant to Federal Rule of Civil Procedure 5(d) and Local Rule CV-5(d) and (e), all other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of the foregoing by email.

/s/ Randall Garteiser

Randall T. Garteiser

CERTIFICATE OF AUTHORIZATION TO FILE UNDER SEAL

Pursuant to Local Rule CV-5(a)(7)A), I certify that this document is being filed under seal as it contains information designated as confidential under the parties' protective order.